In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 892

HEAVENLY CREATIONS, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 21–24) is reported at 339 F. 2d 7. The opinion and order of the Federal Trade Commission (App. 9a–17a)[1] have not been officially reported.

JURISDICTION

The judgment of the court of appeals denying the petition to review and enforcing the Commission's order, was entered on December 16, 1964. The petition for certiorari was filed on February 9, 1965. The ju-

[1] "App." refers to the brief and appendix filed by petitioners in the court below. "Comm. App." refers to the brief and appendix filed by the Commission in the court below.

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risdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in finding that petitioners' utilization of fictitious retail prices constituted an unlawful deceptive practice, the Federal Trade Commission correctly rejected petitioners' proffered evidence regarding (1) the public's familiarity with the practice of using fictitious list prices and (2) the custom of using fictitious list prices in the automobile industry.

2. Whether the Commission's cease and desist order properly prohibits petitioners from preticketing or advertising their goods with list prices appreciably in excess of the highest retail price at which substantial sales are made in petitioners' trade area.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, provides in pertinent part:

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

Petitioners Sam and Sylvia Goldstein are the principal stockholders and general policymakers of the corporate petitioners, New York corporations engaged in the advertising, sale and distribution of various products including costume jewelry, perfumes, dishware, and appliances (App. 22a–23a).

The Federal Trade Commission's amended and supplemental complaints (App. 45a–64a) charged that petitioners violated Section 5(a)(1) of the Federal

Trade Commission Act by engaging in deceptive advertising and fictitious pricing (App. 57a). After a full hearing, the Commission examiner found that advertising and other promotional materials distributed by petitioners contained substantially higher price quotations for various products than the customary and usual retail prices for those articles and that petitioners attached labels to certain of its products which contained prices substantially higher than the customary retail prices for those products (App. 25a–30a).

The instant petition relates principally to the examiner's rejection of petitioners' attempts to prove (1) a generally understood custom of fictitious pricing in its particular retail trade, and (2) the existence of fictitious preticketed prices in the automobile industry (Pet. 40a–44a). The Commission held that such evidence was properly rejected (App. 12a–17a) and ordered petitioners to discontinue the deceptive practices (App. 9a–11a). The court of appeals agreed, denied the petitions to review, and enforced the order (Pet. 21–24).

ARGUMENT

1. (a) Misrepresentations concerning the regular and customary price of a product offered for sale have long been recognized as an unfair and deceptive practice within the meaning of the Federal Trade Commission Act. *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112; *Rayex Corp.* v. *Federal Trade Commission*, 317 F. 2d 290 (C.A. 2); *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337 (C.A. 7), certiorari denied,

364 U.S. 883. The objection to fictitious pricing of merchandise is that the purchaser is misled into believing that he is obtaining a bargain at a reduced price when, in fact, he is paying the usual and regular price for the article. The courts have uniformly upheld Commission orders prohibiting both advertising fictitious retail prices (*The Regina Corp.* v. *Federal Trade Commission*, 322 F. 2d 765 (C.A. 3), *Giant Food Inc.* v. *Federal Trade Commission*, 322 F. 2d 977 (C.A. D.C.)) and preticketing products with fictitious prices unrelated to those at which the article is usually sold in trade areas where the representation is made. *Helbros Watch Co.* v. *Federal Trade Commission*, 310 F. 2d 868 (C.A. D.C.), certiorari denied, 372 U.S. 976; *Clinton Watch Company* v. *Federal Trade Commission*, 291 F. 2d 838 (C.A. 7), certiorari denied, 368 U.S. 952.

Although petitioners admit (Comm. App. 17b–23b) having engaged in the practices found by the Commission to be deceptive, they argue that the practice cannot be considered deceptive (Pet. 11–13) if they demonstrate (1) that it is customary to state list prices greater than the price at which the goods involved are ordinarily sold and (2) that this practice is known to the public. They contend that the Commission violated due process by refusing to hear evidence concerning the retail trade practice of inflating suggested list prices. The contention warrants no consideration by this Court. Petitioners' defense is that the public has become so sophisticated that no one is deceived by their fictitious pricing practices (Pet. 5–6). Since it is well settled that the Commission acts not

for the sophisticated alone, this defense has consistently been rejected. *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112; *Helbros Watch Company* v. *Federal Trade Commission*, 310 F. 2d 868 (C.A. D.C.), certiorari denied 372 U.S. 976; *Gelb* v. *Federal Trade Commission*, 144 F. 2d 580 (C.A. 2); *Charles of The Ritz Dist. Corp.* v. *Federal Trade Commission*, 143 F. 2d 676 (C.A. 2). Fictitious pricing is illegal even though it is obvious to some that the price tag is only a come-on. "The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions." *Florence Mfg. Co.* v. *J. C. Dowd & Co.*, 178 Fed. 73, 75 (C.A. 2). Accordingly, the court of appeals was clearly correct in holding that petitioners' offered proof was irrelevant to the validity of practices so inherently and purposely deceptive (Pet. 22).

(b) Nor is there merit to petitioners' objection (Pet. 14–15) to the Commission's refusal to allow evidence of the automobile industry's alleged utilization of fictitious retail prices. As the court below stated (Pet. 22):

> Since complete enforcement coverage is impossible as to so widespread a practice, "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Indus., Inc.* v. *FTC*, 355 U.S. 411, 413 (1958).

The fact that another industry may use the same illegal practice because the Commission has not yet been able to deal with it does not justify petitioners' use of the practice in its industry.

2. There is no basis for petitioners' objection to that part of the Commission order requiring them to cease and desist "[a]dvertising, disseminating or distributing any list, preticketed or suggested retail price that is not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in respondents' trade area; * * *" (App. 10a). Petitioners argue (Pet. 16–17) that adherence to the order would require petitioners to police the resale prices of their retailers and thus violate the antitrust laws. The order clearly contemplates no such anticompetitive action. It simply prohibits petitioners from continuing their practice of fictitious pricing. They can comply by ceasing all preticketing. Or they can continue preticketing if they make a *bona fide* effort to ascertain the retail price level before preticketing. The court of appeals found, correctly we believe, that the order requires only a "good faith" estimate of the price at which substantial sales are made in petitioners' trade area (Pet. 23).

The latter point disposes of petitioners' final contention (Pet. 18–20), that the order is unduly vague. The requirement of the order is satisfied by a belief, in good faith, that any price preticketed is the price at which the goods are selling. Moreover, the order contains the usual provisions for the filing of a compliance report within 60 days (App. 11a), and any diffi-

culties foreseen by the petitioners can be avoided by obtaining the Commission's approval of their proposed plan of compliance. In the event they should desire to alter their original compliance proposal, they have recourse to the Commission for advice. *Regina Corporation* v. *Federal Trade Commission*, 322 F. 2d 765 (C.A. 3); *Giant Food, Inc.* v. *Federal Trade Commission*, 322 F. 2d 977, 987 (C.A. D.C.).

CONCLUSION

The decision below is plainly correct and presents no important question of law warranting further review. The petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
LIONEL KESTENBAUM,
JERRY Z. PRUZANSKY,
Attorneys.

JAMES MCI. HENDERSON,
General Counsel,
J. B. TRULY,
Assistant General Counsel,
MILES J. BROWN,
NORMAN L. HOLMES,
Attorneys,
Federal Trade Commission.

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